

Exhibit K

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CAUSE NO. 2005-38821

ALEJANDRO BENAVIDEZ) IN THE DISTRICT COURT OF
VS.) HARRIS COUNTY, TEXAS
RAILSERVE, INC.) 234TH JUDICIAL DISTRICT

ORAL AND VIDEOTAPED DEPOSITION OF

TIMOTHY BENJAMIN

January 18, 2006

Volume 1

ORAL AND VIDEOTAPED DEPOSITION of TIMOTHY
BENJAMIN, produced as a witness at the instance of the
Plaintiff, and duly sworn, was taken in the above-
styled and numbered cause on the 18th day of January,
2006, from 9:12 a.m. to 10:17 a.m., before Jeanne C.
Pearl, CSR in and for the State of Texas, reported by
stenography, at the offices of Sheehy, Serpe & Ware,
2500 Two Houston Center, 909 Fannin, Houston, Texas,
pursuant to the Texas Rules of Civil Procedure.

1601-75415

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<p>1 APPEARANCES</p> <p>2</p> <p>3 FOR THE PLAINTIFF:</p> <p>4 Mr. Wayne D. Collins</p> <p>5 CADDELL & CHAPMAN</p> <p>6 1331 Lamar, Suite 1070</p> <p>7 Houston, Texas 77010-3027</p> <p>8</p> <p>9 FOR THE DEFENDANT:</p> <p>10 Mr. Raymond A. Neuer</p> <p>11 SHEEHY, SERPE & WARE, P.C.</p> <p>12 2500 Two Houston Center</p> <p>13 909 Fannin</p> <p>14 Houston, Texas 77010-1003</p> <p>15 ALSO PRESENT:</p> <p>16 Mr. James Orms</p> <p>17</p> <p>18 THE VIDEO TECHNICIAN:</p> <p>19 Mr. Brandon Good</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>09:11:56 1 THE VIDEOGRAPHER: This is tape number 1</p> <p>09:11:58 2 in the deposition of Tim Benjamin. Today's date is</p> <p>09:12:00 3 January 18th, 2006. The time is 9:12 a.m. We are now</p> <p>09:12:04 4 on the record. And the court reporter will swear the</p> <p>09:12:06 5 witness in.</p> <p>09:12:06 6 TIMOTHY BENJAMIN,</p> <p>09:12:06 7 having been first duly sworn, testified as follows:</p> <p>09:12:16 8 EXAMINATION</p> <p>09:12:16 9 BY MR. COLLINS:</p> <p>09:12:16 10 Q. How are you doing? My name is Wayne Collins</p> <p>09:12:20 11 and I represent Alex Benavidez in a case that we filed</p> <p>09:12:22 12 against Railserve. Before we start if there's any</p> <p>09:12:26 13 questions about the questions, that you don't</p> <p>09:12:30 14 understand anything about the question I just asked</p> <p>09:12:32 15 you, please let me know, stop and let's make sure we</p> <p>09:12:34 16 understand each other.</p> <p>09:12:36 17 A. Yes, sir.</p> <p>09:12:36 18 Q. If you need to take a break at any time, let</p> <p>09:12:38 19 me know and we'll take a break and go off the record.</p> <p>09:12:42 20 Is this -- will you state your full name for the</p> <p>09:12:46 21 record?</p> <p>09:12:46 22 A. Timothy James Benjamin.</p> <p>09:12:48 23 Q. Okay. Where do you currently reside?</p> <p>09:12:50 24 A. Noonan, Georgia.</p> <p>09:12:52 25 Q. Okay. What's the address?</p>
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<p>09:13:58 1 A. Yes, sir.</p> <p>09:13:58 2 Q. When did you start negotiating contracts for</p> <p>09:14:00 3 Railserve?</p> <p>09:14:02 4 A. At the end of 2001.</p> <p>09:14:06 5 Q. So, by December, 2002 you would have been</p> <p>09:14:08 6 negotiating contracts on behalf of Railserve, Inc.?</p> <p>09:14:12 7 A. Yes, sir.</p> <p>09:14:14 8 Q. Would that include all contracts?</p> <p>09:14:16 9 A. Yes.</p> <p>09:14:24 10 Q. Okay. What did you do before March of 2001?</p> <p>09:14:30 11 A. I was --</p> <p>09:14:30 12 Q. Go ahead.</p> <p>09:14:32 13 A. I was a divisional controller for Guardian</p> <p>09:14:36 14 Industries.</p> <p>09:14:58 15 Q. As far as your education, what -- do you have</p> <p>09:15:02 16 a college degree?</p> <p>09:15:04 17 A. Yes, sir.</p> <p>09:15:04 18 Q. What did you receive your degree in?</p> <p>09:15:06 19 A. I have a Bachelor's of Science in general</p> <p>09:15:10 20 management from the University of Buffalo and an MBA in</p> <p>09:15:14 21 finance, also from the University of Buffalo.</p> <p>09:15:14 22 Q. Okay. Is it fair to say since that time until</p> <p>09:15:16 23 now you've been doing work as a -- in the financial</p> <p>09:15:22 24 field?</p> <p>09:15:22 25 A. Yes.</p>	<p>09:17:02 1 relationship did your testimony have to this matter?</p> <p>09:17:06 2 A. I testified on behalf of the contractual</p> <p>09:17:10 3 relationship between us and International Paper and the</p> <p>09:17:14 4 fact that there was no contractual relationship between</p> <p>09:17:16 5 us and CSX.</p> <p>09:17:22 6 Q. Okay. When you testified in trial, what case</p> <p>09:17:24 7 was that?</p> <p>09:17:24 8 A. I don't remember the employee's name, but the</p> <p>09:17:28 9 situation was him claiming negligence when the vehicle</p> <p>09:17:34 10 door opened and he fell out.</p> <p>09:17:38 11 Q. Was Railserve a party in that matter?</p> <p>09:17:40 12 A. It was Intermodal Transfer.</p> <p>09:17:48 13 Q. Were you employed with Railserve when you gave</p> <p>09:17:50 14 this testimony?</p> <p>09:17:52 15 A. Yes.</p> <p>09:17:52 16 Q. Okay. Did Railserve have a contractual</p> <p>09:17:54 17 relationship with Intermodal?</p> <p>09:18:04 18 MR. NEUER: Wait a second.</p> <p>09:18:08 19 MR. COLLINS: Let's go off the record.</p> <p>09:18:12 20 THE VIDEOGRAPHER: It's 9:18, we're off</p> <p>09:18:16 21 the record.</p> <p>09:18:28 22 (Brief recess.)</p> <p>09:18:28 23 THE VIDEOGRAPHER: 9:18, we're back on</p> <p>09:18:36 24 the record.</p> <p>09:18:38 25 Q. (BY MR. COLLINS) Did Railserve have some type</p>
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<p>09:15:24 1 Q. Okay. Primarily consists of being a</p> <p>09:15:28 2 controller for various companies?</p> <p>09:15:32 3 A. Well, that's including responsibilities</p> <p>09:15:32 4 through that, yes.</p> <p>09:15:38 5 Q. Okay. When did you graduate college?</p> <p>09:15:38 6 A. B.S. in '85, MBA in '86.</p> <p>09:15:50 7 Q. Have you ever given your deposition before?</p> <p>09:15:52 8 A. Yes.</p> <p>09:15:54 9 Q. How many times?</p> <p>09:15:56 10 A. Once as a deposition.</p> <p>09:15:58 11 Q. Have you testified in trial?</p> <p>09:16:00 12 A. Yes.</p> <p>09:16:02 13 Q. Okay. How many times?</p> <p>09:16:02 14 A. Once.</p> <p>09:16:06 15 Q. All right. What case did you testify in</p> <p>09:16:08 16 deposition?</p> <p>09:16:12 17 A. We were not a named defendant. This was an</p> <p>09:16:14 18 employee of one of our locations in Savannah that was</p> <p>09:16:18 19 suing CSX for a defective hand hold on a boxcar.</p> <p>09:16:44 20 Q. Was he suing under FELA, do you remember?</p> <p>09:16:48 21 A. I don't recall.</p> <p>09:16:50 22 Q. Was it safe to assume that Railserve had a</p> <p>09:16:52 23 contract with CSX?</p> <p>09:16:54 24 A. No, sir.</p> <p>09:16:56 25 Q. Okay. How did the employee -- how -- what</p>	<p>09:18:38 1 of contractual relationship with Intermodal?</p> <p>09:18:42 2 A. Not a contractual relationship, no, sir.</p> <p>09:18:44 3 Q. What kind of relationship did they have?</p> <p>09:18:46 4 A. It's another member company, The Marmon Group.</p> <p>09:18:50 5 Q. And what's The Marvin Group?</p> <p>09:18:50 6 A. Marmon Group.</p> <p>09:18:50 7 Q. Marmon.</p> <p>09:18:50 8 A. It's the entity that owns Railserve.</p> <p>09:19:02 9 Q. Okay. Is Railserve considered a subsidiary of</p> <p>09:19:08 10 The Marmon Group?</p> <p>09:19:08 11 A. Yes, sir. Technically it's a member company.</p> <p>09:19:12 12 Q. Define to me what a member company is.</p> <p>09:19:14 13 A. I don't believe that I really can. On our</p> <p>09:19:18 14 letterhead and what we're authorized to do, we're</p> <p>09:19:22 15 authorized to say we're a member company of The Marmon</p> <p>09:19:28 16 Group.</p> <p>09:19:28 17 Q. Does The Marmon Group own all the stock of</p> <p>09:19:32 18 Railserve?</p> <p>09:19:34 19 MR. NEUER: Form.</p> <p>09:19:38 20 Q. (BY MR. COLLINS) You can go ahead and answer.</p> <p>09:19:40 21 A. I honestly don't know how that structure is</p> <p>09:19:42 22 designed. I can tell you we're 100 percent owned of an</p> <p>09:19:48 23 entity within that group.</p> <p>09:19:50 24 Q. 100 percent owned of an entity of that group,</p> <p>09:19:54 25 can you explain that to me?</p>

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<p>09:19:56 1 A. Somewhere within The Marmon Group --</p> <p>09:19:56 2 Q. Uh-huh.</p> <p>09:19:58 3 A. -- there is an entity that owns 100 percent of</p> <p>09:20:00 4 Railserve stock.</p> <p>09:20:06 5 Q. And who would be the best person to tell me</p> <p>09:20:08 6 the structure of The Marmon Group and how Railserve</p> <p>09:20:12 7 fits in?</p> <p>09:20:12 8 A. I would advise that to be Robert Webb who is</p> <p>09:20:16 9 the chief legal counsel for Marmon.</p> <p>09:20:24 10 Q. How long has Railserve been a member of The</p> <p>09:20:30 11 Marmon Group?</p> <p>09:20:30 12 A. 1994, I believe.</p> <p>09:20:48 13 Q. Was Railserve an entity that was acquired by</p> <p>09:20:52 14 The Marmon Group? It was an independent entity and</p> <p>09:20:56 15 then acquired by The Marmon Group?</p> <p>09:20:58 16 A. No, sir.</p> <p>09:20:58 17 Q. Okay. How did that work then?</p> <p>09:21:00 18 A. Trackmobile is another member company of</p> <p>09:21:04 19 Marmon which developed Railserve as an entity.</p> <p>09:21:14 20 Q. Okay. Was Trackmobile acquired by The Marmon</p> <p>09:21:18 21 Group?</p> <p>09:21:18 22 A. I don't know how they came into being part of</p> <p>09:21:22 23 the group.</p> <p>09:21:32 24 Q. Okay. As far as Railserve, you're the</p> <p>09:21:34 25 controller now?</p>	<p>09:23:16 1 trying to go down the list in order of size and the</p> <p>09:23:18 2 smaller ones aren't coming to me.</p> <p>09:23:22 3 Q. Okay. And this group, is it fair to say this</p> <p>09:23:26 4 group all deals with transportation services?</p> <p>09:23:30 5 A. No, sir.</p> <p>09:23:30 6 Q. What else do they deal with?</p> <p>09:23:32 7 A. Here's a good example. Amarillo Wind Gear is</p> <p>09:23:36 8 a company that makes wind gears.</p> <p>09:23:46 9 Q. Okay. And this Transportation Services, I'm</p> <p>09:23:48 10 sorry, I didn't catch the name, Transportation</p> <p>09:23:50 11 Services?</p> <p>09:23:50 12 A. And Engineered Products.</p> <p>09:23:52 13 Q. Engineered Products?</p> <p>09:23:52 14 A. Uh-huh.</p> <p>09:23:54 15 Q. Group is a group of entities within The Marmon</p> <p>09:23:58 16 Group?</p> <p>09:23:58 17 A. Yes, sir.</p> <p>09:24:26 18 Q. Okay. Okay. You're familiar with the Deer</p> <p>09:24:34 19 Park Rail Terminal, correct?</p> <p>09:24:34 20 A. Yes, sir.</p> <p>09:24:36 21 Q. Okay. And there's an entity called the Deer</p> <p>09:24:38 22 Park Rail Terminal, correct?</p> <p>09:24:40 23 A. Yes, sir.</p> <p>09:24:40 24 Q. All right. And that entity is owned by U.S.</p> <p>09:24:42 25 Development, correct?</p>
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<p>09:21:36 1 A. My technical title is vice-president of</p> <p>09:21:38 2 finance and controller.</p> <p>09:21:48 3 Q. And how many vice-presidents are there? You</p> <p>09:21:54 4 can approximate if you need to.</p> <p>09:21:56 5 A. Five.</p> <p>09:21:58 6 Q. And who do you report to?</p> <p>09:22:00 7 A. I report to Ken Fischl.</p> <p>09:22:02 8 Q. What is Ken Fischl's role?</p> <p>09:22:06 9 A. He is the sector president. Fischl, by the</p> <p>09:22:14 10 way, is spelled F I S C H L.</p> <p>09:22:18 11 Q. Okay. Who does he report to, if you know?</p> <p>09:22:20 12 A. I don't know, sir.</p> <p>09:22:22 13 Q. Okay. Is he considered the head of the</p> <p>09:22:24 14 company, head of Railserve?</p> <p>09:22:26 15 A. No. He's the head of the group of which</p> <p>09:22:30 16 Railserve is a part.</p> <p>09:22:36 17 Q. And what group is that?</p> <p>09:22:38 18 A. Transportation Services and Engineered</p> <p>09:22:40 19 Products.</p> <p>09:22:48 20 Q. And what other entities are a member of that</p> <p>09:22:50 21 group?</p> <p>09:22:54 22 A. Union Tank Car, Trackmobile, Penn Machine,</p> <p>09:23:02 23 Enersul, Procor.</p> <p>09:23:10 24 Q. Anyone else?</p> <p>09:23:12 25 A. There are a few others whose names -- I'm</p>	<p>09:24:44 1 A. I believe that to be true.</p> <p>09:24:48 2 Q. Okay. And the Deer Park Rail Terminal --</p> <p>09:24:52 3 okay. Just for purposes of clarification for this</p> <p>09:24:56 4 deposition, I want to make sure we got these terms</p> <p>09:24:58 5 clear. There's a Deer Park Rail Terminal which is the</p> <p>09:25:02 6 location that's over there near Deer Park and it's a</p> <p>09:25:06 7 rail terminal. You're familiar with that, right?</p> <p>09:25:08 8 A. I've been there once.</p> <p>09:25:10 9 Q. Okay. And then there's an entity that's</p> <p>09:25:12 10 called the Deer Park Rail Terminal, Inc., right?</p> <p>09:25:14 11 A. They are one and the same to me.</p> <p>09:25:22 12 Q. Okay. As far as this deposition is concerned,</p> <p>09:25:26 13 can we agree that if I'm referring or if we're</p> <p>09:25:28 14 referring to the actual physical location, we'll refer</p> <p>09:25:34 15 to that as the Deer Park Rail Terminal and if we're</p> <p>09:25:36 16 referring to the entity, we're referring to the Deer</p> <p>09:25:40 17 Park Rail Terminal, Inc.</p> <p>09:25:40 18 A. Physical location versus the legal</p> <p>09:25:42 19 designation.</p> <p>09:25:44 20 Q. Exactly.</p> <p>09:25:44 21 A. Yes, sir.</p> <p>09:25:46 22 Q. Okay. I just want to make sure we're clear on</p> <p>09:25:50 23 that. All right. You recall that in December 3rd,</p> <p>09:25:52 24 2002 Railserve entered into a contract with Deer Park</p> <p>09:25:58 25 Rail Terminal, Inc., correct?</p>

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<p>09:26:00 1 A. Yes.</p> <p>09:26:04 2 Q. Okay.</p> <p>09:26:04 3 A. And I hesitate because I'm not sure if it's an</p> <p>09:26:06 4 Inc. or an L.L.C., but yes.</p> <p>09:26:10 5 Q. Okay. I'll show you the agreement.</p> <p>09:26:10 6 A. Okay.</p> <p>09:26:10 7 Q. I'm not trying to trick you.</p> <p>09:26:16 8 MR. COLLINS: You want to start these</p> <p>09:26:18 9 with number 1 or you want to leave off where we left</p> <p>09:26:20 10 off on the other one?</p> <p>09:26:24 11 MR. NEUER: Why don't we do mine as</p> <p>09:26:26 12 Defendant's 1 and yours as Plaintiff's 1 and we'll just</p> <p>09:26:30 13 each number consecutively.</p> <p>09:26:30 14 MR. COLLINS: Okay.</p> <p>09:26:34 15 MR. NEUER: How does that sound?</p> <p>09:26:34 16 MR. COLLINS: Sounds great.</p> <p>09:26:34 17 (Plaintiff's Exhibit 1 marked.)</p> <p>09:26:46 18 Q. (BY MR. COLLINS) I've handed you what's been</p> <p>09:26:48 19 marked as exhibit, Plaintiff's Exhibit Number 1. Do</p> <p>09:26:52 20 you recognize that document?</p> <p>09:26:54 21 A. Yes, sir.</p> <p>09:26:54 22 Q. Okay. And what is that document for the</p> <p>09:26:56 23 ladies and gentlemen of the jury?</p> <p>09:26:56 24 A. This is the rail switching agreement between</p> <p>09:27:00 25 Deer Park Rail Terminal, Inc. and Railserve, Inc.</p>	<p>09:28:28 1 A. Yes, sir.</p> <p>09:28:28 2 Q. What does that mean to you?</p> <p>09:28:30 3 A. It means that as part of the list of cars Deer</p> <p>09:28:34 4 Park Rail Terminal would like placed in a specific</p> <p>09:28:36 5 location, you'll need to take one car from the midst of</p> <p>09:28:40 6 a stream of cars and place it in a separate spot.</p> <p>09:28:44 7 Q. And Railserve was doing that at the Deer Park</p> <p>09:28:46 8 Rail Terminal, correct?</p> <p>09:28:48 9 A. Yes, sir.</p> <p>09:28:48 10 Q. And Railserve was going to provide I believe</p> <p>09:28:56 11 two locomotives to do that with?</p> <p>09:29:00 12 A. Railserve owns two locomotives that are there,</p> <p>09:29:02 13 yes.</p> <p>09:29:04 14 Q. Okay. Are there other locomotives there?</p> <p>09:29:08 15 A. No, sir.</p> <p>09:29:08 16 Q. Is there any other entity as far as you know</p> <p>09:29:10 17 performing switching operations at the Deer Park Rail</p> <p>09:29:14 18 Terminal other than Railserve, Inc.?</p> <p>09:29:18 19 A. No, sir.</p> <p>09:29:34 20 Q. If you'll look at paragraph Roman number 1A,</p> <p>09:29:40 21 just go ahead and read that first paragraph there and</p> <p>09:29:44 22 I'll ask you a few questions about it.</p> <p>09:30:08 23 A. Okay.</p> <p>09:30:08 24 Q. Okay. In the first sentence it says operator</p> <p>09:30:12 25 hereby agrees -- and operator for the term is defined</p>
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<p>09:27:08 1 Q. Okay. We're going to go through this</p> <p>09:27:08 2 contract, but in your own words will you describe for</p> <p>09:27:12 3 me your understanding of the services Railserve, Inc.</p> <p>09:27:16 4 was providing to the Deer Park Rail Terminal per this</p> <p>09:27:20 5 contract?</p> <p>09:27:24 6 A. Sure. We will engage with Deer Park Rail</p> <p>09:27:26 7 Terminal to provide switching services for that</p> <p>09:27:28 8 location based on the scope of work agreed upon between</p> <p>09:27:34 9 the two parties.</p> <p>09:27:38 10 Q. And when you say switching services, what do</p> <p>09:27:42 11 you mean by that term?</p> <p>09:27:42 12 A. Deer Park Rail Terminal will give us a list of</p> <p>09:27:46 13 cars that they want placed on certain spots or certain</p> <p>09:27:50 14 tracks. We will arrange the cars to their request</p> <p>09:27:56 15 inside their owned or leased space.</p> <p>09:28:08 16 Q. And this switch -- this would include coupling</p> <p>09:28:10 17 cars, correct?</p> <p>09:28:12 18 A. Yes, sir.</p> <p>09:28:14 19 Q. Okay. And this would include cutting certain</p> <p>09:28:16 20 cars out to be put on the main track, correct?</p> <p>09:28:20 21 MR. NEUER: Form.</p> <p>09:28:22 22 Q. (BY MR. COLLINS) You can go ahead.</p> <p>09:28:22 23 A. Can you restate the question, please?</p> <p>09:28:24 24 Q. Yeah. I mean, are you familiar with the term</p> <p>09:28:26 25 cutting out cars?</p>	<p>09:30:14 1 as Railserve, Inc., correct?</p> <p>09:30:22 2 A. Yes, sir.</p> <p>09:30:26 3 Q. Okay. And the first part of it, little letter</p> <p>09:30:30 4 i, it says all switching and movement services. What</p> <p>09:30:32 5 is meant by movement services?</p> <p>09:30:36 6 MR. NEUER: Form. Go ahead and answer.</p> <p>09:30:38 7 A. To us they're synonymous. They request us to</p> <p>09:30:42 8 place a car in a spot.</p> <p>09:30:44 9 Q. (BY MR. COLLINS) Okay.</p> <p>09:30:46 10 A. So, we will switch that car to that spot.</p> <p>09:30:50 11 Q. Before we go any further, were you aware of</p> <p>09:30:54 12 this contract when it was being negotiated?</p> <p>09:30:58 13 A. Yes, sir.</p> <p>09:30:58 14 Q. Okay. Did you read it before it was signed?</p> <p>09:31:02 15 A. Yes, sir.</p> <p>09:31:02 16 Q. Okay. Did you make any changes to this</p> <p>09:31:04 17 contract before it was signed?</p> <p>09:31:06 18 A. I'm sure we did.</p> <p>09:31:08 19 Q. Okay. Who would have been involved in</p> <p>09:31:10 20 negotiating this contract with you?</p> <p>09:31:12 21 A. It would have been myself.</p> <p>09:31:16 22 Q. Just you?</p> <p>09:31:18 23 A. I'm sorry, I was waiting for you to write. It</p> <p>09:31:20 24 would be me with Dan Borgen.</p> <p>09:31:20 25 Q. Okay.</p>

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<p>09:31:22 1 A. And Paul Tucker from U.S. Development.</p> <p>09:31:28 2 Q. And who is Dan Borgen?</p> <p>09:31:30 3 A. He's one of the principals for U.S.</p> <p>09:31:34 4 Development.</p> <p>09:31:36 5 Q. Okay. And, in fact, your signature is on the</p> <p>09:31:38 6 last page of this contract, correct?</p> <p>09:31:40 7 A. Yes, sir.</p> <p>09:31:40 8 Q. Okay. With the title controller?</p> <p>09:31:42 9 A. Yes, sir.</p> <p>09:31:56 10 Q. All right. Okay. And in that same sentence,</p> <p>09:31:58 11 I'm going to read the whole sentence and I'll ask the</p> <p>09:32:00 12 question. All switching and movement services for any</p> <p>09:32:02 13 and all railcars located within the Deer Park Rail</p> <p>09:32:06 14 Terminal regardless of ownership. What does regardless</p> <p>09:32:10 15 of ownership mean in this context?</p> <p>09:32:14 16 MR. NEUER: Form.</p> <p>09:32:14 17 Q. (BY MR. COLLINS) You can go ahead and answer.</p> <p>09:32:16 18 A. That we will move a car that is owned by an</p> <p>09:32:18 19 entity that may not necessarily be Deer Park Rail</p> <p>09:32:30 20 Terminal.</p> <p>09:32:30 21 Q. Do you know if Deer Park Rail Terminal owned</p> <p>09:32:32 22 any of the cars that were on the terminal, in Deer Park</p> <p>09:32:36 23 Rail Terminal?</p> <p>09:32:36 24 A. I do not know if they do or don't.</p> <p>09:32:44 25 Q. You do know that Railserve at the Deer Park</p>	<p>09:34:14 1 A. I would start with Paul Tucker, Dan Borgen and</p> <p>09:34:18 2 they can redirect from there.</p> <p>09:34:38 3 Q. Okay. And then the next sentence says, the</p> <p>09:34:40 4 little letter i, two little i, any other tasks for</p> <p>09:34:44 5 services reasonably requested by Deer Park Rail</p> <p>09:34:50 6 Terminal related to the operation of the terminal</p> <p>09:34:52 7 during the term of this agreement or any extension</p> <p>09:34:54 8 thereof. And my question is do you have an</p> <p>09:34:58 9 understanding what services were reasonably requested</p> <p>09:35:02 10 or may have been reasonably requested?</p> <p>09:35:06 11 MR. NEUER: Form.</p> <p>09:35:08 12 Q. (BY MR. COLLINS) You can go ahead and answer.</p> <p>09:35:10 13 A. Can you restate the question for me, please?</p> <p>09:35:12 14 Q. In that sentence I'm trying to figure out in</p> <p>09:35:14 15 your mind did you have an understanding of what</p> <p>09:35:16 16 services may be reasonably requested?</p> <p>09:35:22 17 A. The first and foremost that I know we did do</p> <p>09:35:24 18 there is provide yardmaster duties.</p> <p>09:35:28 19 Q. Okay. What does yardmaster duties include?</p> <p>09:35:30 20 A. That is the person that will take the switch</p> <p>09:35:34 21 list prepared by Deer Park Rail Terminal, get the</p> <p>09:35:40 22 switch list to the crews and then be the one that will</p> <p>09:35:46 23 communicate with the Port Terminal Railroad for when</p> <p>09:35:48 24 they're dropping off inbound or picking up outbound.</p> <p>09:35:58 25 Q. And who are the yardmasters for Deer -- for</p>
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<p>09:32:48 1 Rail Terminal moves cars that are owned other by --</p> <p>09:32:52 2 owned by other entities other than Deer Park Rail</p> <p>09:32:58 3 Terminal, though, correct?</p> <p>09:32:58 4 A. Yes, we do switch cars owned by other</p> <p>09:33:02 5 entities.</p> <p>09:33:06 6 Q. Okay. Would you agree that that constitutes a</p> <p>09:33:08 7 majority of the switching activities that Railserve</p> <p>09:33:10 8 does at the Deer Park Rail Terminal?</p> <p>09:33:14 9 A. I don't understand the question.</p> <p>09:33:14 10 Q. Okay. Does the majority of the work that</p> <p>09:33:20 11 Railserve does at the Deer Park Rail Terminal involve</p> <p>09:33:24 12 moving cars owned by entities other than the Deer Park</p> <p>09:33:30 13 Rail Terminal?</p> <p>09:33:30 14 A. Very well. I believe the preponderance of the</p> <p>09:33:34 15 switching is done by cars owned by other than Deer Park</p> <p>09:33:40 16 Rail Terminal.</p> <p>09:33:50 17 Q. Okay. Do you have any idea who owned -- what</p> <p>09:33:54 18 entities owned the cars that are switched at the Deer</p> <p>09:33:58 19 Park Rail Terminal by Railserve?</p> <p>09:34:00 20 A. No, sir.</p> <p>09:34:00 21 Q. Who would know that?</p> <p>09:34:02 22 A. The management of Deer Park Rail Terminal.</p> <p>09:34:10 23 Q. Do you know any particular people who that</p> <p>09:34:12 24 would be or just the management at Deer Park Rail</p> <p>09:34:14 25 Terminal?</p>	<p>09:36:04 1 Railserve at the Deer Park Rail Terminal in April of</p> <p>09:36:08 2 2005?</p> <p>09:36:08 3 A. I only know one by name.</p> <p>09:36:10 4 Q. Who is that?</p> <p>09:36:10 5 A. Mike Henderson.</p> <p>09:36:12 6 Q. Mike Henderson. Were there any other duties</p> <p>09:36:22 7 besides switching and yardmaster duties at the Deer</p> <p>09:36:26 8 Park -- that Railserve performed at the Deer Park Rail</p> <p>09:36:30 9 Terminal?</p> <p>09:36:30 10 A. Not to the best of my knowledge.</p> <p>09:37:06 11 Q. Did Railserve help load cars at the Deer Park</p> <p>09:37:10 12 Rail Terminal?</p> <p>09:37:10 13 A. Not to the best of my knowledge.</p> <p>09:37:16 14 Q. Are you saying like, no, that didn't happen or</p> <p>09:37:20 15 I don't know one way or the other?</p> <p>09:37:22 16 A. I don't believe that it happened.</p> <p>09:37:34 17 Q. Okay. Were you aware that Deer Park Rail</p> <p>09:37:36 18 Terminal ever lined up cars to have -- tank cars to</p> <p>09:37:40 19 have various petrochemical liquids pumped into them?</p> <p>09:37:44 20 Is that possible?</p> <p>09:37:46 21 A. I'm aware that they have asked us to spot cars</p> <p>09:37:48 22 in a place that facilitated loading.</p> <p>09:38:08 23 Q. And in those cases are you aware who was doing</p> <p>09:38:12 24 the actual loading of the cars?</p> <p>09:38:14 25 A. No, I do not know.</p>

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<p>09:38:16 1 Q. Okay. Do you know whose product was being</p> <p>09:38:18 2 loaded into the cars?</p> <p>09:38:20 3 A. I believe it's Shell's product.</p> <p>09:38:34 4 Q. And when you say Shell, you're referring to</p> <p>09:38:38 5 Shell Oil?</p> <p>09:38:40 6 A. Yes.</p> <p>09:38:40 7 Q. With various entities that may include. Okay.</p> <p>09:38:56 8 I want you to go down to paragraph B on the same page.</p> <p>09:38:58 9 It says operator shall initiate and maintain a service</p> <p>09:39:02 10 quality management process which shall include without</p> <p>09:39:06 11 limitation abiding by objective performance measures</p> <p>09:39:08 12 and periodic reporting of service performance measures</p> <p>09:39:12 13 to Deer Park Rail Terminal. What were the service</p> <p>09:39:18 14 quality management processes that y'all were going to</p> <p>09:39:22 15 maintain, that Railserve was going to maintain?</p> <p>09:39:30 16 A. There are a number of things in the</p> <p>09:39:32 17 operational level which I know go on, but I can't</p> <p>09:39:36 18 delineate what they are.</p> <p>09:39:38 19 Q. Okay.</p> <p>09:39:38 20 A. I can only speak to meetings I've been</p> <p>09:39:40 21 involved in.</p> <p>09:39:40 22 Q. Okay. Speak to those. To the best of your</p> <p>09:39:44 23 knowledge I'm trying to figure out what that term</p> <p>09:39:46 24 entails.</p> <p>09:39:46 25 A. First of all, they want to make sure we're</p>	<p>09:41:16 1 and maintain that classification, correct?</p> <p>09:41:20 2 A. Yes, sir.</p> <p>09:41:20 3 Q. Okay. And explain to me what classification</p> <p>09:41:26 4 is being made or what that entails.</p> <p>09:41:28 5 A. The basis of the classification I can't speak</p> <p>09:41:30 6 to. I do know that the crews are given a switch list</p> <p>09:41:34 7 which is predicated on that classification. Now, how</p> <p>09:41:36 8 they're classified, I don't know.</p> <p>09:41:38 9 Q. So, is it fair to say that Railserve needs to</p> <p>09:41:42 10 keep track of the cars and their classifications that</p> <p>09:41:44 11 are on the Deer Park Rail Terminal?</p> <p>09:41:48 12 A. Yes.</p> <p>09:42:10 13 Q. Okay. And the next sentence talks about shall</p> <p>09:42:14 14 be accurately switched to make outbound movements?</p> <p>09:42:18 15 A. I'm sorry, where are you?</p> <p>09:42:20 16 Q. Number 2 right under number 1.</p> <p>09:42:26 17 A. Okay.</p> <p>09:42:28 18 Q. It says shall be accurately switched to make</p> <p>09:42:32 19 outbound movements. Where are those outbound movements</p> <p>09:42:36 20 going?</p> <p>09:42:36 21 A. I have no idea. Our services are constrained</p> <p>09:42:42 22 to the yard itself, so once we classify --</p> <p>09:42:44 23 Q. Well, who is picking up the outbound</p> <p>09:42:46 24 movements?</p> <p>09:42:48 25 A. Port Terminal Railroad.</p>
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<p>09:39:50 1 safe as do we.</p> <p>09:39:50 2 Q. Uh-huh.</p> <p>09:39:52 3 A. So, if there's any incidents out there either</p> <p>09:39:54 4 caused by us or caused by another party, if there's a</p> <p>09:39:56 5 problem with a track, we need to discuss those to make</p> <p>09:39:58 6 sure we can work together to maintain a safe operation.</p> <p>09:40:00 7 So, I know if there's any incidents out there, we'll</p> <p>09:40:04 8 report with each other.</p> <p>09:40:06 9 Q. Okay.</p> <p>09:40:06 10 A. I also know that if there's problems getting</p> <p>09:40:10 11 the cars turned -- getting the cars switched and</p> <p>09:40:16 12 classified in an appropriate manner, that will also be</p> <p>09:40:18 13 a discussion point.</p> <p>09:40:22 14 Q. Okay. Anything else?</p> <p>09:40:26 15 A. None that I've been involved in.</p> <p>09:40:36 16 Q. Okay. If you go down, there's a number 1 in</p> <p>09:40:38 17 the second paragraph that says classification of</p> <p>09:40:42 18 railcars within the terminal shall be maintained at all</p> <p>09:40:44 19 times and shall be audited weekly by DPRT. Is it fair</p> <p>09:40:52 20 to assume that that classification of railcars within</p> <p>09:40:54 21 the terminal shall be maintained by Railserve?</p> <p>09:41:00 22 A. Can you ask that question again, please?</p> <p>09:41:02 23 Q. Yeah. I mean, the question I have is</p> <p>09:41:10 24 Railserve was going to -- was required under this</p> <p>09:41:14 25 contract to classify the railcars within the terminal</p>	<p>09:43:00 1 Q. Do you know where Port Terminal Railroad takes</p> <p>09:43:02 2 them?</p> <p>09:43:04 3 A. No, sir.</p> <p>09:43:06 4 Q. You do know that those -- once it goes through</p> <p>09:43:10 5 the Port Terminal Railroad it can't end up on a</p> <p>09:43:14 6 Burlington North track or Union Pacific track, correct?</p> <p>09:43:18 7 A. I don't know where they go. Those sound like</p> <p>09:43:20 8 plausible options once they leave.</p> <p>09:43:30 9 Q. Any trains, cars brought in to the Deer Park</p> <p>09:43:34 10 Rail Terminal, where are they brought from?</p> <p>09:43:36 11 A. The Port Terminal drops them off. I don't</p> <p>09:43:38 12 know where they come from.</p> <p>09:43:46 13 Q. Does the Deer Park Rail Terminal, Inc. entity</p> <p>09:43:48 14 know, the Deer Park Rail Terminal, Inc. entity</p> <p>09:43:56 15 manufacture anything?</p> <p>09:44:02 16 A. No, sir.</p> <p>09:44:02 17 Q. Do they own any goods to be hauled as far as</p> <p>09:44:06 18 you know?</p> <p>09:44:08 19 MR. NEUER: Form.</p> <p>09:44:08 20 Q. (BY MR. COLLINS) You can go ahead and answer.</p> <p>09:44:10 21 A. Not to the best of my knowledge.</p> <p>09:44:14 22 Q. To the best of your knowledge, what's your</p> <p>09:44:16 23 understanding of their business? What do they do?</p> <p>09:44:18 24 A. They store railcars.</p> <p>09:44:24 25 Q. They store railcars and also line them up to</p>

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<p>09:44:28 1 be put on outbound shipments, correct?</p> <p>09:44:30 2 MR. NEUER: Form.</p> <p>09:44:32 3 Q. (BY MR. COLLINS) You can go ahead and answer.</p> <p>09:44:34 4 A. Well, obviously if something is going to be</p> <p>09:44:36 5 stored, it's eventually going to be shipped.</p> <p>09:44:36 6 Q. Okay.</p> <p>09:44:38 7 A. And that methodology of eventually getting it</p> <p>09:44:40 8 out is going to be part of the switching process.</p> <p>09:44:48 9 Q. Do you know how long the cars are typically</p> <p>09:44:50 10 stored at the Deer Park Rail Terminal?</p> <p>09:44:54 11 A. No, sir.</p> <p>09:44:54 12 Q. Can you approximate it?</p> <p>09:44:56 13 A. No, sir.</p> <p>09:44:56 14 MR. NEUER: Form.</p> <p>09:44:58 15 Q. (BY MR. COLLINS) Does it vary among cars?</p> <p>09:45:00 16 A. I have absolutely no idea.</p> <p>09:45:02 17 Q. Who would be the best person to answer that</p> <p>09:45:04 18 question?</p> <p>09:45:04 19 A. Paul Tucker and Dan Borgen.</p> <p>09:45:24 20 Q. Okay. We're going to the next page, number 2.</p> <p>09:45:28 21 And at the top of the page there's a sentence number 3.</p> <p>09:45:32 22 MR. COLLINS: Before we do that I need to</p> <p>09:45:34 23 take a break. I need to get some water.</p> <p>09:45:38 24 THE VIDEOGRAPHER: It's 9:45, we're off</p> <p>09:45:42 25 the record.</p>	<p>09:48:02 1 Q. Okay.</p> <p>09:48:04 2 MR. NEUER: You have to say out loud,</p> <p>09:48:06 3 Tim.</p> <p>09:48:06 4 A. I'm sorry, yes, sir.</p> <p>09:48:10 5 Q. (BY MR. COLLINS) Then the next sentence, it</p> <p>09:48:12 6 says railcars ordered for delivery to internal terminal</p> <p>09:48:18 7 transload tracks. What's transload tracks?</p> <p>09:48:20 8 A. I don't know.</p> <p>09:48:26 9 Q. From the terminal storage tracks. What is</p> <p>09:48:28 10 that?</p> <p>09:48:30 11 A. That I'm presuming to be any one of the number</p> <p>09:48:32 12 of tracks that are inside Deer Park Terminal owned or</p> <p>09:48:38 13 leased property.</p> <p>09:48:44 14 Q. Then number 5, it talks about the inbound</p> <p>09:48:46 15 delivery point. Do you know where that is?</p> <p>09:48:50 16 A. I don't know where it is, no.</p> <p>09:48:50 17 Q. Do you know what that is?</p> <p>09:48:52 18 A. It's the converse of the outbound point. It's</p> <p>09:48:54 19 a track designated to accept cars being delivered by</p> <p>09:49:00 20 the Port Terminal Railroad Association.</p> <p>09:49:06 21 Q. Okay. And do you have an understanding of</p> <p>09:49:06 22 what the Port Terminal Railroad Association does?</p> <p>09:49:12 23 A. Yes.</p> <p>09:49:12 24 Q. And what is that?</p> <p>09:49:12 25 A. To the best of my knowledge, they're a short</p>
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<p>09:46:36 1 (Brief recess.)</p> <p>09:46:36 2 THE VIDEOGRAPHER: Back on the record at</p> <p>09:46:46 3 9:46.</p> <p>09:46:48 4 Q. (BY MR. COLLINS) Okay. Paragraph number 3</p> <p>09:46:50 5 says railcars ordered for shipment outbound from the</p> <p>09:46:54 6 terminal shall be selected, placed and made available</p> <p>09:46:56 7 at the outbound delivery point. We'll stop there.</p> <p>09:47:00 8 What's your understanding of the outbound delivery</p> <p>09:47:04 9 point?</p> <p>09:47:04 10 A. There is a track that's designated for the</p> <p>09:47:08 11 point at which Port Terminal Railroad will come in and</p> <p>09:47:10 12 pick up a unit.</p> <p>09:47:18 13 Q. Okay. And further on in that sentence, an</p> <p>09:47:22 14 order, specified in the order within four hours after</p> <p>09:47:26 15 the original time of the order. What's the purpose of</p> <p>09:47:30 16 that time requirement, if you know?</p> <p>09:47:32 17 A. No, sir, I don't know.</p> <p>09:47:38 18 Q. But can I read that or understand that to mean</p> <p>09:47:42 19 once Railserve receives an order, it has to be there</p> <p>09:47:46 20 within four hours, correct, to be on the outbound, at</p> <p>09:47:50 21 the outbound delivery point?</p> <p>09:47:52 22 A. Yeah.</p> <p>09:47:54 23 Q. Okay. Unless it's received after the normal</p> <p>09:47:56 24 day shift and there's some more time allowed, correct?</p> <p>09:47:56 25 A. Uh-huh.</p>	<p>09:49:14 1 line railroad that will transport cars through and</p> <p>09:49:20 2 along the Houston Ship Channel.</p> <p>09:49:26 3 Q. And they also have connections to outbound</p> <p>09:49:28 4 tracks owned by various railroad companies, correct?</p> <p>09:49:32 5 A. I'm sorry?</p> <p>09:49:36 6 MR. NEUER: Form.</p> <p>09:49:38 7 Q. (BY MR. COLLINS) Port Terminal Railroad also</p> <p>09:49:38 8 has tracks that lead to Union Pacific and Burlington</p> <p>09:49:44 9 North tracks, correct?</p> <p>09:49:46 10 MR. NEUER: Form.</p> <p>09:49:46 11 A. I do know they will connect with other class</p> <p>09:49:48 12 one railroads. I don't know specifically which ones</p> <p>09:49:50 13 they are.</p> <p>09:50:24 14 Q. (BY MR. COLLINS) This contract requires</p> <p>09:50:28 15 Railserve to provide two switching locomotives at the</p> <p>09:50:34 16 Deer Park Rail Terminal. Does in fact Railserve do</p> <p>09:50:36 17 that at the Deer Park Rail Terminal?</p> <p>09:50:38 18 A. Yes, sir.</p> <p>09:50:44 19 Q. And whose responsibility is it to maintain and</p> <p>09:50:46 20 operate those locomotives?</p> <p>09:50:50 21 A. Railserve's.</p> <p>09:50:50 22 Q. Okay. Exclusive responsibility?</p> <p>09:50:58 23 A. Yes, sir.</p> <p>09:51:02 24 Q. Okay. Let's go to page 3, Roman numeral V and</p> <p>09:51:10 25 it says compensation. It says monthly fee, the</p>

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<p>09:51:14 1 operator shall be paid a monthly fee in arrears.</p> <p>09:51:20 2 During the initial term the monthly fees shall be</p> <p>09:51:22 3 \$45,500, correct?</p> <p>09:51:26 4 A. That's what it says, yes, sir.</p> <p>09:51:28 5 Q. And does Deer Park Rail Terminal pay Railserve</p> <p>09:51:34 6 \$45,500 per month?</p> <p>09:51:36 7 A. Can you ask what point in time you're asking?</p> <p>09:51:40 8 Q. From the beginning of this contract until</p> <p>09:51:42 9 April, 2005?</p> <p>09:51:44 10 A. At the beginning of the contract that's a true</p> <p>09:51:46 11 statement.</p> <p>09:51:48 12 Q. Okay. When did that change?</p> <p>09:51:50 13 A. At some point, I can't tell you when, the</p> <p>09:51:52 14 scope of work expanded to be two 12-hour shifts and the</p> <p>09:51:56 15 compensation rate changed because the scope of work</p> <p>09:51:58 16 increased.</p> <p>09:51:58 17 Q. Was there a writing to reflect that?</p> <p>09:52:00 18 A. I don't believe there is.</p> <p>09:52:04 19 Q. Okay. So, this is the contract under which</p> <p>09:52:06 20 you're operating, correct?</p> <p>09:52:08 21 A. Yes, sir.</p> <p>09:52:08 22 Q. Okay. But there was an expansion of the shift</p> <p>09:52:10 23 hours?</p> <p>09:52:12 24 A. Yes.</p> <p>09:52:12 25 Q. Okay. And what is Railserve being paid now</p>	<p>09:54:00 1 Inc. has any personnel who are switch -- doing</p> <p>09:54:04 2 switching operations at the Deer Park Rail Terminal?</p> <p>09:54:06 3 A. Absolutely not.</p> <p>09:54:08 4 Q. Okay. The only people, entity, doing</p> <p>09:54:12 5 switching operations at the Deer Park Rail Terminal is</p> <p>09:54:16 6 Railserve, correct?</p> <p>09:54:16 7 A. Correct.</p> <p>09:54:20 8 Q. Okay. Does anybody from Deer Park Rail</p> <p>09:54:26 9 Terminal, Inc. in any way supervise or monitor the</p> <p>09:54:32 10 activities of Railserve on the property?</p> <p>09:54:34 11 MR. NEUER: Form.</p> <p>09:54:36 12 Q. (BY MR. COLLINS) You can go ahead and answer.</p> <p>09:54:36 13 A. You asked supervise or monitor. Supervise,</p> <p>09:54:40 14 no.</p> <p>09:54:40 15 Q. Okay.</p> <p>09:54:42 16 A. We are a contractor. We're a separate</p> <p>09:54:42 17 contractor.</p> <p>09:54:44 18 Q. All right.</p> <p>09:54:44 19 A. Independent of Deer Park Rail Terminal,</p> <p>09:54:46 20 Incorporated. So, therefore, it's subject to the rules</p> <p>09:54:48 21 of this independent contract. Supervision is a much</p> <p>09:54:52 22 more difficult question to answer. They're our</p> <p>09:54:54 23 customer.</p> <p>09:54:54 24 Q. Okay.</p> <p>09:54:54 25 A. So, being our customer they have the right to</p>
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<p>09:52:14 1 for its services at the Deer Park Rail Terminal?</p> <p>09:52:18 2 A. Roughly \$89,000 per month flat fee.</p> <p>09:52:24 3 Q. And when did that start?</p> <p>09:52:24 4 A. I don't know.</p> <p>09:52:26 5 Q. Was it -- do you know if it was before or</p> <p>09:52:28 6 after April of 2005?</p> <p>09:52:30 7 A. It was before.</p> <p>09:52:46 8 Q. Okay. Was Alex Benavidez an employee of</p> <p>09:52:48 9 Railserve, Inc.?</p> <p>09:52:50 10 A. Is he or was he?</p> <p>09:52:52 11 Q. Was he?</p> <p>09:52:52 12 A. Yes, he was.</p> <p>09:52:54 13 Q. Okay. And thanks for making that</p> <p>09:52:54 14 clarification. In April of 2005 at the time of his</p> <p>09:52:58 15 accident was he an employee of Railserve, Inc.?</p> <p>09:53:02 16 A. Yes, he was.</p> <p>09:53:02 17 Q. Okay. There was no other entity in which he</p> <p>09:53:06 18 was employed by or W-2'd from or anything like that?</p> <p>09:53:14 19 A. No, sir.</p> <p>09:53:36 20 Q. Okay. Does Deer Park Rail Terminal have any</p> <p>09:53:38 21 personnel who are operating -- strike that. Does Deer</p> <p>09:53:46 22 Park Rail Terminal, Inc. have any personnel working at</p> <p>09:53:52 23 the Deer Park Rail Terminal as far as you know?</p> <p>09:53:54 24 A. I do not know.</p> <p>09:53:58 25 Q. Okay. Do you know if Deer Park Rail Terminal,</p>	<p>09:54:56 1 monitor the performance they're receiving.</p> <p>09:55:00 2 Q. Do they -- are you aware of any audits or any</p> <p>09:55:02 3 kind of inspections that Deer Park Rail Terminal, Inc.</p> <p>09:55:06 4 does of your performance?</p> <p>09:55:08 5 A. No, sir.</p> <p>09:55:12 6 Q. Okay. Do you know who within Deer Park Rail</p> <p>09:55:14 7 Terminal, Inc. monitors the performance of Railserve?</p> <p>09:55:18 8 A. Brent Tucker and Paul Tucker are the primary</p> <p>09:55:20 9 parties.</p> <p>09:55:22 10 Q. Okay. What's their position?</p> <p>09:55:22 11 A. I don't know Brent's title. Paul Tucker is --</p> <p>09:55:28 12 and, again, I don't know a specific title, but he is</p> <p>09:55:30 13 their senior operations manager.</p> <p>09:55:40 14 Q. And does Railserve have its own independent</p> <p>09:55:44 15 office location at the Deer Park Rail Terminal or is it</p> <p>09:55:48 16 shared with someone?</p> <p>09:55:52 17 A. There's an office there --</p> <p>09:55:54 18 Q. Okay.</p> <p>09:55:54 19 A. -- that we work out of. When somebody from</p> <p>09:55:58 20 Deer Park U.S. Development comes, they can also share</p> <p>09:56:02 21 space there. I do not know if there's somebody</p> <p>09:56:06 22 permanently assigned to that location or not.</p> <p>09:56:10 23 Q. Okay. But that -- is that space provided to</p> <p>09:56:14 24 Railserve by Deer Park Rail Terminal?</p> <p>09:56:16 25 A. Yes, it is.</p>

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<p>09:56:18 1 Q. Okay. Do y'all have to pay a lease or any 09:56:20 2 money for using that space? 09:56:24 3 A. No. That's part of the contract. 09:56:48 4 Q. Okay. Have you ever seen a list of customers 09:56:52 5 that Deer Park Rail Terminal, Inc. has for the 09:56:56 6 operations at the Deer Park Rail Terminal? 09:56:58 7 A. No, I have not. 09:57:10 8 Q. Okay. And I'm going to ask -- go down this 09:57:12 9 list and it's going to be the same question for each 09:57:16 10 entity on this list. Are you aware that Deer Park Rail 09:57:20 11 Terminal, Inc. provides services -- let me ask that 09:57:28 12 question again because I got lost in that one. Sorry. 09:57:32 13 A. That's all right. 09:57:44 14 Q. And this question I'm asking I'm talking about 09:57:46 15 the services that Deer Park Rail Terminal, Inc. 09:57:48 16 provides for at the Deer Park Rail Terminal. Are you 09:57:52 17 aware that Deer Park Rail Terminal provides services 09:57:58 18 for a company known as Air Products, Inc.? 09:58:02 19 MR. NEUER: Form. 09:58:02 20 A. I do not know that. 09:58:04 21 Q. (BY MR. COLLINS) Okay. BP Amoco Chemicals? 09:58:04 22 MR. NEUER: Form. 09:58:08 23 A. I do not know that. 09:58:08 24 MR. NEUER: Can I just have a form 09:58:08 25 objection?</p>	<p>09:58:48 1 Q. Velsicol Chemical Corp.? 09:58:50 2 A. I don't know that. 09:58:52 3 Q. A&R Transport Inc.? 09:58:54 4 A. I don't know that. 09:58:54 5 Q. BASF Corporation? 09:58:56 6 A. I don't know that. 09:58:58 7 Q. Resolution Performance Products, L.L.C.? 09:59:00 8 A. I don't know that. 09:59:02 9 Q. General American Field Services Corporation? 09:59:04 10 A. I don't know that. 09:59:06 11 Q. Chevron Phillips Chemical Company? 09:59:08 12 A. I don't know that. 09:59:08 13 Q. The Burlington North and Santa Fe Railroad 09:59:12 14 Company? 09:59:12 15 A. I know they will operate with them, but I do 09:59:16 16 not believe they have a contract with them for services 09:59:18 17 at that area. 09:59:24 18 Q. If U.S. Development or someone from Deer Park 09:59:26 19 Rail Terminal testifies that they have a contract with 09:59:30 20 Burlington North, Northern and Santa Fe Railroad 09:59:34 21 Company, will you have any specific information of 09:59:36 22 which you have personal knowledge to dispute that? 09:59:40 23 A. Can you rephrase that, please? 09:59:42 24 Q. If it is found out later on that or the 09:59:46 25 testimony shows that Deer Park Rail Terminal, Inc. does</p>
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<p>09:58:08 1 MR. COLLINS: Yeah, you can have a form 09:58:10 2 running objection for this. 09:58:10 3 Q. (BY MR. COLLINS) Bayport Rail Terminal, Inc.? 09:58:14 4 A. I do not know that. 09:58:14 5 Q. Celanese, Limited? 09:58:16 6 A. I do not know that. 09:58:18 7 Q. The Dow Chemical Company? 09:58:20 8 A. I don't know that. 09:58:22 9 Q. Intercontinental Terminal Company? 09:58:22 10 A. I don't know that. 09:58:22 11 Q. Do you know what the Intercontinental Terminal 09:58:26 12 Company is? 09:58:26 13 A. No, sir. 09:58:26 14 Q. Okay. The Lubrizol Corporation? 09:58:28 15 A. I don't know that. 09:58:30 16 Q. Occidental Chemical Corporation? 09:58:32 17 A. I don't know that. 09:58:32 18 Q. PM Ag Products? 09:58:34 19 A. I don't know that. 09:58:36 20 Q. Rohm & Haas Company, Inc.? 09:58:38 21 A. I don't know that. 09:58:40 22 Q. I believe this is Rohmax, R O H M A X, Inc.? 09:58:44 23 A. I don't know that. 09:58:44 24 Q. Vopak Logistics Services, Inc.? 09:58:48 25 A. I don't know that.</p>	<p>09:59:50 1 indeed have a contract with the Burlington Northern and 09:59:54 2 Santa Fe Railroad Company, do you have any specific 09:59:58 3 information to dispute that? 10:00:02 4 MR. NEUER: Form. 10:00:04 5 Q. (BY MR. COLLINS) You can go ahead and answer 10:00:06 6 it. 10:00:06 7 A. No. Our contract is limited solely to Deer 10:00:08 8 Park Rail Terminal, so I don't know. 10:00:10 9 Q. So -- 10:00:10 10 A. I don't know if they do or don't have a 10:00:12 11 specific contract with any entity. 10:00:14 12 Q. Okay. That's fine. Munoz, same question as 10:00:18 13 before for Munoz Enterprises, Inc.? 10:00:22 14 A. I don't know. 10:00:22 15 Q. Sunoco, Inc. R&M? 10:00:24 16 A. I don't know. 10:00:24 17 Q. Total Petrochemicals USA, Inc.? 10:00:28 18 A. I don't know. 10:00:28 19 Q. Innovene USA, L.L.C.? 10:00:32 20 A. I don't know. 10:00:32 21 Q. And Shell Oil Products? 10:00:34 22 A. I know they do something with them, but again 10:00:36 23 I don't know what. 10:00:44 24 Q. Okay. Have you ever seen one of the terminal 10:00:46 25 services agreements with Deer Park Rail Terminal has</p>

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<p>10:00:52 1 with any of its customers?</p> <p>10:00:54 2 A. No, sir.</p> <p>10:01:14 3 Q. Okay. Does Railserve at the Deer Park Rail</p> <p>10:01:18 4 Terminal do -- it does switching, correct?</p> <p>10:01:22 5 A. Yes.</p> <p>10:01:22 6 Q. Track maintenance?</p> <p>10:01:24 7 A. No, sir.</p> <p>10:01:24 8 Q. Car cleaning?</p> <p>10:01:24 9 A. No, sir.</p> <p>10:01:26 10 Q. Car loading and unloading?</p> <p>10:01:28 11 A. No, sir.</p> <p>10:01:28 12 Q. Car inspection?</p> <p>10:01:28 13 A. No, sir.</p> <p>10:01:28 14 Q. Car repair?</p> <p>10:01:30 15 A. No, sir.</p> <p>10:01:30 16 Q. Railcar inventory management?</p> <p>10:01:36 17 A. Can you ask that further?</p> <p>10:01:40 18 Q. Does rail -- does Railserve provide rail car</p> <p>10:01:44 19 inventory management services for the Deer Park Rail</p> <p>10:01:48 20 Terminal, Inc.?</p> <p>10:01:48 21 MR. NEUER: Form.</p> <p>10:01:52 22 A. We provide information that Deer Park will</p> <p>10:01:54 23 place into their system.</p> <p>10:01:56 24 Q. (BY MR. COLLINS) Okay. What information do</p> <p>10:01:58 25 you provide?</p>	<p>10:03:56 1 Q. (BY MR. COLLINS) Yeah. Is interchange a</p> <p>10:03:56 2 term-of-art used in the rail service industry?</p> <p>10:04:00 3 A. Yes, it means that the Port Terminal will hand</p> <p>10:04:02 4 off a collection of cars to those -- to whatever</p> <p>10:04:04 5 railroad it connects with.</p> <p>10:05:26 6 Q. Okay. Do you have an understanding of how</p> <p>10:05:26 7 U.S. -- strike that. Do you have an understanding of</p> <p>10:05:30 8 how Deer Park Rail Terminal makes their money for the</p> <p>10:05:38 9 cars it handles at the Deer Park Rail Terminal?</p> <p>10:05:40 10 MR. NEUER: Form.</p> <p>10:05:42 11 A. It's just an anecdotal understanding that it's</p> <p>10:05:46 12 for storing cars.</p> <p>10:05:48 13 Q. (BY MR. COLLINS) And providing switching</p> <p>10:05:48 14 operations, right?</p> <p>10:05:52 15 A. No, sir.</p> <p>10:05:54 16 Q. Part of the storage includes switching</p> <p>10:05:56 17 operations, correct?</p> <p>10:05:58 18 MR. NEUER: Form.</p> <p>10:05:58 19 A. Your question is still in the context of how</p> <p>10:06:00 20 does Deer Park Rail Terminal receive revenue?</p> <p>10:06:04 21 Q. (BY MR. COLLINS) Yes.</p> <p>10:06:06 22 A. I don't believe switching is a part of that.</p> <p>10:06:12 23 Q. Okay. Well, the customer doesn't get a</p> <p>10:06:14 24 separate bill for switching services, right?</p> <p>10:06:16 25 A. Correct, they do not. Well, okay, you're</p>
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<p>10:01:58 1 A. The car number and the spot that it's on.</p> <p>10:02:02 2 Q. Okay.</p> <p>10:02:02 3 A. We don't provide the software.</p> <p>10:02:06 4 Q. Okay. And you provide the actual data to go</p> <p>10:02:08 5 into the software, right?</p> <p>10:02:10 6 A. Yes.</p> <p>10:02:10 7 Q. Okay. Does Railserve perform trailer handling</p> <p>10:02:14 8 services for Deer Park Rail Terminal?</p> <p>10:02:16 9 A. No, sir.</p> <p>10:02:16 10 Q. Checkpoint services?</p> <p>10:02:22 11 A. No, sir.</p> <p>10:03:14 12 Q. Are you aware that Deer Park Rail Terminal</p> <p>10:03:18 13 indicates in their website that it services railroads</p> <p>10:03:26 14 to the Port Terminal Railroad with an interchange to</p> <p>10:03:32 15 Union Pacific and BNSF?</p> <p>10:03:32 16 A. I do not know that.</p> <p>10:03:34 17 Q. What is your understanding of the word</p> <p>10:03:36 18 interchange in that context?</p> <p>10:03:40 19 A. Can you restate the context, please?</p> <p>10:03:42 20 Q. It basically says Port Terminal Railroad</p> <p>10:03:44 21 Association with interchange to the Union Pacific and</p> <p>10:03:44 22 BNSF?</p> <p>10:03:50 23 MR. NEUER: Form.</p> <p>10:03:52 24 A. And your question to me is how do I interpret</p> <p>10:03:54 25 the word interchange?</p>	<p>10:06:18 1 asking me how Deer Park sends invoices. I don't know</p> <p>10:06:22 2 how they send invoices, but I can't imagine they would.</p> <p>10:06:26 3 Q. Okay. They get one charge essentially which</p> <p>10:06:28 4 my understanding your testimony is they get charged for</p> <p>10:06:32 5 storing there, correct?</p> <p>10:06:32 6 A. That's my understanding. Again, I don't know</p> <p>10:06:34 7 specifically how they make arrangements. I know</p> <p>10:06:36 8 when -- in the industry when you have to store cars, if</p> <p>10:06:40 9 we have to store locomotives --</p> <p>10:06:40 10 Q. Uh-huh.</p> <p>10:06:42 11 A. -- that is charged on a per car per day fee.</p> <p>10:06:46 12 Now, how they do it in particular, I can only assume</p> <p>10:06:48 13 it's the same way as the industry standard. But,</p> <p>10:06:52 14 again, I don't know specifically how they do it.</p> <p>10:06:54 15 Q. But it's not a situation where you ultimately</p> <p>10:06:56 16 get paid by the customer, right?</p> <p>10:06:58 17 A. Oh, absolutely not. We have one contract</p> <p>10:07:02 18 directly with Deer Park Rail Terminal.</p> <p>10:07:02 19 Q. And they pay you regardless if they get paid</p> <p>10:07:06 20 by the customer?</p> <p>10:07:08 21 A. That's correct.</p> <p>10:07:08 22 Q. Okay. So, I mean, I can't envision a</p> <p>10:07:10 23 situation where, you know, their customers would be</p> <p>10:07:14 24 getting an invoice for storage, switching, coupling. I</p> <p>10:07:18 25 mean, it's not itemized like that, correct?</p>

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<p>10:07:22 1 A. I couldn't imagine it being that way.</p> <p>10:07:32 2 Q. Okay. And do you have any sense of -- is Deer</p> <p>10:07:42 3 Park Rail Terminal providing an exclusive service for a</p> <p>10:07:46 4 set number of entities?</p> <p>10:07:48 5 MR. NEUER: Form.</p> <p>10:07:50 6 A. What do you mean by exclusive?</p> <p>10:07:52 7 Q. (BY MR. COLLINS) Well, I mean, anybody who is</p> <p>10:07:54 8 willing to pay to have their car brought there and</p> <p>10:07:58 9 stored can have it done, correct?</p> <p>10:08:00 10 MR. NEUER: Form.</p> <p>10:08:02 11 A. I don't know.</p> <p>10:08:30 12 Q. (BY MR. COLLINS) Do you know whose cargos --</p> <p>10:08:34 13 let me strike that. The cargo that is in the cars if</p> <p>10:08:40 14 they're not empty is owned by the various customers of</p> <p>10:08:42 15 Deer Park Rail Terminal, right?</p> <p>10:08:46 16 MR. NEUER: Form.</p> <p>10:08:46 17 A. I'm sorry, I don't know.</p> <p>10:08:48 18 Q. (BY MR. COLLINS) Okay. Do you know who owns</p> <p>10:08:50 19 the cars?</p> <p>10:08:54 20 A. No, sir.</p> <p>10:08:54 21 Q. Are you aware that any of the cars are rented</p> <p>10:08:56 22 from one entity for use by another entity?</p> <p>10:09:00 23 MR. NEUER: Form.</p> <p>10:09:00 24 A. That's a fairly common industry practice.</p> <p>10:09:04 25 Q. (BY MR. COLLINS) Okay. And, in fact, the car</p>	<p>10:10:40 1 Q. Okay. And would you agree that the</p> <p>10:10:44 2 remuneration Railserve is receiving from Deer Park Rail</p> <p>10:10:52 3 Terminal, Inc. is a fixed charge per month?</p> <p>10:11:04 4 A. Yes.</p> <p>10:11:04 5 Q. And that has increased over time, but that's</p> <p>10:11:06 6 based on the man-hours, correct?</p> <p>10:11:12 7 A. Yes, sir.</p> <p>10:12:20 8 Q. Okay. Are there any warehouses on the</p> <p>10:12:24 9 property of the Deer Park Rail Terminal?</p> <p>10:12:28 10 A. Not to the best of my knowledge.</p> <p>10:13:00 11 MR. COLLINS: I want to take a short</p> <p>10:13:00 12 break and look at a couple of notes and I think we</p> <p>10:13:04 13 might be done.</p> <p>10:13:04 14 THE VIDEOGRAPHER: It's 10:13, we're off</p> <p>10:13:06 15 the record.</p> <p>10:15:28 16 (Brief recess.)</p> <p>10:15:28 17 THE VIDEOGRAPHER: Back on the record at</p> <p>10:15:40 18 10:15.</p> <p>10:16:06 19 Q. (BY MR. COLLINS) Are you familiar with</p> <p>10:16:06 20 Railserve's website?</p> <p>10:16:08 21 A. Yes, sir.</p> <p>10:16:16 22 Q. Okay. Did you have any role in its creation</p> <p>10:16:18 23 or the information contained in there?</p> <p>10:16:20 24 A. No, sir.</p> <p>10:16:20 25 Q. Okay. How often do you look at the website?</p>
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<p>10:09:08 1 that -- are you aware that the car that Alex Benavidez</p> <p>10:09:12 2 was on was identified as a GATX car, correct?</p> <p>10:09:16 3 A. I would have to look at the accident report to</p> <p>10:09:18 4 confirm that.</p> <p>10:09:20 5 Q. Okay. Do you have an understanding of cars</p> <p>10:09:22 6 with the designation GATX, are they typically owned by</p> <p>10:09:26 7 a certain entity and leased to another entity?</p> <p>10:09:30 8 MR. NEUER: Form.</p> <p>10:09:32 9 A. Are you asking as a generic industry practice?</p> <p>10:09:36 10 Q. (BY MR. COLLINS) Yes.</p> <p>10:09:38 11 A. Yes.</p> <p>10:09:38 12 Q. Okay. And what's the company with the GATX</p> <p>10:09:40 13 that typically leases those cars? Who owns them?</p> <p>10:09:42 14 A. Who owns GATX?</p> <p>10:09:46 15 Q. Yes.</p> <p>10:09:46 16 A. I'm sorry, I don't know.</p> <p>10:09:48 17 Q. But GATX is a company, correct?</p> <p>10:09:48 18 A. Yes, it is.</p> <p>10:09:48 19 Q. Okay.</p> <p>10:09:50 20 A. GATX is a destination in the rail</p> <p>10:09:54 21 classification code that represents a company. I just</p> <p>10:09:56 22 don't know who that company is specifically.</p> <p>10:09:58 23 Q. Okay. All right. But your understanding is</p> <p>10:10:02 24 that they're in the business of leasing cars, right?</p> <p>10:10:04 25 A. Yes.</p>	<p>10:16:22 1 A. Do I personally look at the website?</p> <p>10:16:26 2 Q. Yeah.</p> <p>10:16:26 3 A. Virtually never.</p> <p>10:16:26 4 (Plaintiff's Exhibit 2 marked.)</p> <p>10:16:28 5 Q. (BY MR. COLLINS) Okay. I'm going to hand you</p> <p>10:16:28 6 what is Exhibit 2. Won't you just kind of skim through</p> <p>10:16:54 7 that. And the question is going to be do you recognize</p> <p>10:17:00 8 that to be -- Exhibit Number 2 to be a printout of Rail</p> <p>10:17:06 9 Service's website?</p> <p>10:17:06 10 A. You asked if this is a printout of Rail</p> <p>10:17:08 11 Service's website?</p> <p>10:17:10 12 Q. Yeah.</p> <p>10:17:10 13 A. What is Rail Services?</p> <p>10:17:12 14 Q. Railserve, I'm sorry. Railserve, Inc.?</p> <p>10:17:12 15 A. Yes.</p> <p>10:17:20 16 Q. Okay.</p> <p>10:17:20 17 A. It is our website.</p> <p>10:17:20 18 MR. COLLINS: All right. I'll pass the</p> <p>10:17:22 19 witness.</p> <p>10:17:24 20 MR. NEUER: We'll reserve ours.</p> <p>10:17:24 21 MR. COLLINS: Okay.</p> <p>10:17:24 22 THE VIDEOGRAPHER: It's 10:17, we're off</p> <p>10:17:26 23 the record. This is the end of tape 1.</p> <p>24</p> <p>25</p>

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1	CHANGES AND SIGNATURE	1	CAUSE NO. 2005-38821
2		2	ALEJANDRO BENAVIDEZ) IN THE DISTRICT COURT OF
3	PAGE LINE CHANGE REASON	3)
4		4	VS.) HARRIS COUNTY, TEXAS
5		5)
6		6	RAILSERVE, INC.) 234TH JUDICIAL DISTRICT
7		7	REPORTER'S CERTIFICATION
8		8	DEPOSITION OF TIMOTHY BENJAMIN
9		9	January 18, 2006
10		10	I, Jeanne C. Pearl, Certified Shorthand Reporter
11		11	in and for the State of Texas, hereby certify to the
12		12	following:
13		13	That the witness, TIMOTHY BENJAMIN, was duly
14		14	sworn by the officer and that the transcript of the
15		15	oral deposition is a true record of the testimony given
16		16	by the witness:
17		17	That the deposition transcript was submitted on
18		18	, to the witness or to the attorney
19		19	for the witness for examination, signature and return
20		20	to me by :
21		21	That the amount of time used by each party at the
22		22	deposition is as follows:
23		23	Mr. Wayne D. Collins - 1 HR: 4 MINS
24		24	That pursuant to information given to the
25		25	deposition officer at the time said testimony was
			taken, the following includes counsel for all parties
Page 47		Page 49	
1	I, TIMOTHY BENJAMIN, have read the foregoing	1	of record:
2	deposition and hereby affix my signature that same is	2	
3	true and correct, except as noted above.	3	Mr. Wayne D. Collins, Attorney for Plaintiff;
4		4	Mr. Raymond A. Neuer, Attorney for Defendant.
5	TIMOTHY BENJAMIN	5	I further certify that I am neither counsel for,
6		6	related to, nor employed by any of the parties or
7	THE STATE OF)	7	attorneys in the action in which this proceeding was
8	COUNTY OF)	8	taken, and further that I am not financially or
9		9	otherwise interested in the outcome of the action.
10	Before me, , on this day	10	Further certification requirements pursuant to
11	personally appeared TIMOTHY BENJAMIN, known to me (or	11	Rule 203 of TRCP will be certified to after they have
12	proved to me under oath or through)	12	occurred.
13	(description of identity card or other document)) to be	13	Certified to by me this 24th day of January,
14	the person whose name is subscribed to the foregoing	14	2006.
15	instrument and acknowledged to me that they executed	15	
16	the same for the purposes and consideration therein	16	
17	expressed.	17	
18	Given under my hand and seal of office	18	JEANNE C. PEARL, Texas CSR 456
19	this day of , 2006.	19	Expiration: 12/31/06
20		20	LEGALINK - HOUSTON
21	NOTARY PUBLIC IN AND FOR	21	Firm Registration Number 210
22	THE STATE OF TEXAS	22	1235 North Loop West, Suite 510
23		23	Houston, Texas 77008
24		24	(713) 426-0400
25		25	

13 (Pages 46 to 49)

Tim Benjamin - 1-18-06

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1 FURTHER CERTIFICATION UNDER RULE 203 TRCP

2

3 The original deposition was/was not returned to
4 the deposition officer on ;

5 If returned, the attached Changes and Signature
6 page contains any changes and the reasons therefor;

7 If returned, the original deposition was delivered
8 to , Custodial Attorney;

9 That \$ is the deposition officer's
10 charges to the Custodial Attorney for preparing the
11 original deposition transcript and any copies of
12 exhibits;

13 That the deposition was delivered in accordance
14 with Rule 203.3, and that a copy of this certificate
15 was served on all parties shown herein on and filed
16 with the Clerk.

17 Certified to by me this day of ,
18 2006.

19

20

21

22 JEANNE C. PEARL, Texas CSR 456

Expiration Date: 12/31/06

23 LEGALINK - HOUSTON

Firm Registration Number 210

24 1235 North Loop West, Suite 510

Houston, Texas 77008

25 (713) 426-0400

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